

December 12, 2013

Daniel Ashe  
Director  
U.S. Fish and Wildlife Service  
1849 C Street, NW  
Washington, DC 20240

Re: Revised Designation of Critical Habitat for the Contiguous U.S. Distinct Population Segment of the Canada Lynx (78 Fed. Reg. 59430)

Dear Mr. Ashe,

The Office of Advocacy (Advocacy) submits these comments on the U.S. Fish and Wildlife Service's (FWS or the Service) proposed rule, *Revised Designation of Critical Habitat for the Contiguous U.S. Distinct Population Segment of the Canada Lynx* (Lynx Proposed Rule).<sup>1</sup> Advocacy is concerned that FWS has improperly certified the proposed rule. Advocacy believes FWS should publish an Initial Regulatory Flexibility Analysis (IRFA).

### **The Office of Advocacy**

Advocacy was established to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration ("SBA"), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act ("RFA"),<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act ("SBREFA"),<sup>3</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small businesses and consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>4</sup> The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the

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<sup>1</sup> *Revised Designation of Critical Habitat for the Contiguous U.S. Distinct Population Segment of the Canada Lynx*, 78 Fed. Reg. 59430 (Sept. 26, 2013).

<sup>2</sup> The Regulatory Flexibility Act, 5 U.S.C. § 601-612 (1980).

<sup>3</sup> Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (to be codified at 5 U.S.C. § 601 et seq.).

<sup>4</sup> The Small Business Jobs Act, Pub. L. No. 111-240 (2010).

proposed rule, unless the agency certifies that the public interest is not served by doing so.

## **Background**

The Endangered Species Act (ESA) prohibits Federal agencies from engaging in activities that are likely to jeopardize the continued existence of species that have been listed as endangered or threatened.<sup>5</sup> The ESA also directs FWS to determine critical habitat for listed species and prohibits the adverse modification or destruction of critical habitat.<sup>6</sup> While FWS is prohibited from considering economic impacts in its listing decision,<sup>7</sup> it is required to consider the economic impacts of designating an area as critical habitat and is given authority to exclude areas from critical habitat designations where the costs of designating the area outweigh the benefits.<sup>8</sup>

The Fish and Wildlife Service's current practice is to publish a proposed rule designating critical habitat without simultaneously publishing an economic analysis evaluating the economic impact that such designation will have on small businesses as required by the RFA. FWS does not publish the economic analysis and regulatory flexibility analysis for notice and comment until after publication of the proposed designation of critical habitat. Advocacy has communicated to FWS that it must comply with the Regulatory Flexibility Act at the time of the publication of the proposed critical habitat designation.<sup>9</sup>

On February 28, 2012, President Obama issued a memorandum entitled, *Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens*<sup>10</sup> (the Memorandum), directing FWS to make its economic analysis available for public comment when the agency publishes a proposed rule to designate critical habitat. The Memorandum notes that simultaneous publication reduces regulatory uncertainty while promoting environmental safety and economic growth.<sup>11</sup> On August 24, 2012, in response to the Presidential Memorandum, FWS published the proposed rule. On August 28, 2013,<sup>12</sup> FWS published the final rule mandating the simultaneous publication of economic analyses and proposed critical habitat designations. The final rule became effective on October 31, 2013.

On September 26, 2013, FWS published the Lynx proposed rule.<sup>13</sup> FWS has certified that the rule will not have a significant impact on a substantial number of small businesses based on its mistaken belief that critical habitat designations only impact federal

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<sup>5</sup> 16 U.S.C. §1636(2).

<sup>6</sup> Id.

<sup>7</sup> 16 U.S.C. §1533(b)(1)(A).

<sup>8</sup> Id. § 1533(b)(2).

<sup>9</sup> See e.g., Letter to Daniel Ashe, Director, Fish and Wildlife Service, from Winslow Sargeant, Chief Counsel, Office of Advocacy, dated October 11, 2011 at <http://www.sba.gov/advocacy/816/27721>.

<sup>10</sup> Presidential Memorandum, *supra* note 3.

<sup>11</sup> Id.

<sup>12</sup> *Revisions to the Regulations for Impact Analyses of Critical Habitat*, 78 Fed. Reg. 53058 (August 28, 2013).

<sup>13</sup> See fn. 1.

agencies. Small businesses, especially in the forestry industry, are concerned that FWS is not considering the impact this designation will have on the industry.

**The Designation of Critical Habitat Imposes Costs Directly on Small Businesses and These Costs Must Be Properly Evaluated as Required by the RFA**

The Regulatory Flexibility Act requires that agencies perform regulatory flexibility analyses or certify that their proposed rules will not have a significant economic impact on a substantial number of small entities.<sup>14</sup> This analysis is required only for small entities that are directly affected by the regulations.<sup>15</sup> The Service asserts that a regulatory flexibility analysis is not required for this proposed rule because NOAA and FWS are the only entities affected by this rule.<sup>16</sup> FWS makes a similar argument in most of its proposed designations for critical habitat arguing that federal agencies are the only entities directly regulated by critical habitat designations therefore FWS can always certify critical habitat designations.<sup>17</sup> FWS frequently cites *American Trucking Associations, Inc., v. EPA* as the basis for this determination.<sup>18</sup>

In *American Trucking*, the Environmental Protection Agency (EPA) established a primary national ambient air quality standard (NAAQS) for ozone. The basis of the EPA's certification was that the NAAQS only regulated small entities indirectly through state implementation plans. EPA was *required* to approve any state plan meeting the standards and could not reject a plan based upon its view of the wisdom of a state's choices.<sup>19</sup> The states had broad discretion to determine how to achieve compliance with the NAAQS.<sup>20</sup> Under these circumstances, the court concluded that EPA had properly certified because any impacts to small entities would be indirect.<sup>21</sup>

Critical habitat designations are distinguishable from the regulation at issue in *American Trucking*. First, *American Trucking* was dealing with federal regulations requiring states to act but giving the states broad discretion regarding how to implement goals. The court noted that state plans could avoid imposing impacts on small businesses and it was the state's decision and only the state's decision whether or not to impose such impacts.<sup>22</sup> Critical habitat regulations are implemented through *federal agencies* which, in many cases, will only be taking action because a third party small entity is requesting a permit. Once the small entity has requested a permit from a federal agency that agency is

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<sup>14</sup> 5 U.S.C. §601, et.seq.

<sup>15</sup> See *Mid-Tex Elec. Coop. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985); *American Trucking Ass'ns v. EPA*, 175 F.3d 1027 (D.C. 1999).

<sup>16</sup> 77 Fed. Reg. at 51509.

<sup>17</sup> See, e.g., *Listing Four Subspecies of Mazama Pocket Gopher and Designation of Critical Habitat*, 77 Fed. Reg. 73770,73806 (December 11, 2012).

<sup>18</sup> See e.g. *Listing and Designation of Critical Habitat for the Grotto Sculpin*, 78 Fed. Reg. 2658 (FWS cites to *American Trucking v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), in the SBREFA analysis section of the draft economic analysis, pg. A-1).

<sup>19</sup> *Id.* at 1044.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 1045.

<sup>22</sup> *Id.* at 1044.

required to consult with FWS or NOAA.<sup>23</sup> FWS and NOAA actions are governed by a 315-page handbook promulgated by FWS and NOAA detailing the procedures that the federal agencies are to follow in order to obtain FWS's and NOAA's permission to issue a permit to the small entity requesting a permit.<sup>24</sup> The agencies contemplate that the third party applicant will be involved in this process and impacted by its decisions during the process, as the handbook discusses the applicant's role, rights and responsibilities.<sup>25</sup> Moreover, the handbook specifically notes that modifications to the applicant's proposed projects may be necessary in order to obtain FWS's written concurrence for the federal agency to issue a permit.<sup>26</sup> The handbook also states that FWS has a great deal of say in the decision regarding which modifications are acceptable.<sup>27</sup>

Unlike the states in *American Trucking*, any federal agency that stands between FWS and the applicant has very little discretion. FWS is essentially arguing that it, a federal agency, is not regulating small entities because another federal agency, which is required to consult with FWS and obtain FWS's consent to action, stands as an intermediary in the process. However, FWS retains the final decision as to what modifications are reasonable and prudent and therefore adequate in order to refrain from running afoul of the ESA.<sup>28</sup> Since these decisions directly impact small entities, FWS reliance on *American Trucking* is misplaced and the Service must perform a regulatory flexibility analyses or provide a factual basis for certifying that their proposed rules will not have a significant economic impact on a substantial number of small entities.

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<sup>23</sup> 16 U.S.C. §1536(a)(2); Endangered Species Consultation Handbook at 2-6 available at [http://www.fws.gov/endangered/esa-library/pdf/esa\\_section7\\_handbook.pdf](http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf) (March 1998) (last visited January 23, 2013) ("The Act requires action agencies to consult or confer with the Services when there is discretionary Federal involvement or control over the action, whether apparent (issuance of a new Federal permit), or less direct (State operation of a program that retains Federal oversight, such as the National Pollution Discharge Elimination System Program").

<sup>24</sup> Endangered Species Consultation Handbook at 2-6.

<sup>25</sup> *Id.* at 2-12.

<sup>26</sup> *Id.* at 3-6 ("Conflict resolutions during informal consultation may involve changes in construction scheduling, engineering design, pesticide formulation or application method, location, emission or discharge levels and many other changes"), 3-12 ("Since concurrence depends upon implementation of the modifications, the concurrence letter must clearly state any modifications agreed to during informal consultation. If agreement cannot be reached, the agency is advised to initiate formal consultation.").

<sup>27</sup> *Id.* at 4-44 ("The Services will, in most cases, defer to the action agency's expertise and judgment as to the feasibility of an alternative. When the agency maintains that the alternative is not reasonable or not prudent, the reasoning for its position is to be provided in writing for the administrative record. The Services retain the final decision on which reasonable and prudent alternatives are included in the biological opinion. When necessary, the Services may question the agency's view of the scope of its authorities to implement reasonable and prudent alternatives.")

<sup>28</sup> Endangered Species Consultation Handbook at 2-6 ("The Services will, in most cases, defer to the action agency's expertise and judgment as to the feasibility of an alternative. When the agency maintains that the alternative is not reasonable or not prudent, the reasoning for its position is to be provided in writing for the administrative record. The Services retain the final decision on which reasonable and prudent alternatives are included in the biological opinion. When necessary, the Services may question the agency's view of the scope of its authorities to implement reasonable and prudent alternatives.")

## **FWS Should Provide RFA Analyses at the Time of the Critical Habitat Designation**

Notwithstanding the above discussion, FWS's express commitment to the President's Memorandum in both this proposed rulemaking and the final Northern Spotted Owl (NSO) critical habitat designation support providing a robust RFA analysis. Referencing Executive Order 13563, the memorandum directs FWS to conduct a "full analysis of the economic impacts... give careful consideration to providing the maximum exclusion from the final revised critical habitat ... [and] to the extent permitted by law, adopt the least burdensome means, including avoidance of unnecessary burdens on States, tribes, localities, and the private sector."<sup>29</sup> All of these presidential directives speak to providing a full analysis of impacts to small entities and a commitment to examining regulatory alternatives that lessen any disproportionate burdens to those entities.

Finally, Advocacy notes that NOAA complies with RFA requirements and has provided thorough analyses of economic impacts to small entities by economic and geographic sector, as well as a discussion of regulatory alternatives that expressly considers impacts to small entities. For example, in NOAA's Final Regulatory Flexibility Analysis (FRFA) for the critical habitat designation of the North American Green Sturgeon, the agency presented annualized cost estimates for small entities by economic activity and geographic unit, including state and county level analyses.<sup>30</sup> In addition, NOAA's FRFA discusses regulatory alternatives and steps taken to minimize significant economic impacts to small entities. Importantly, this discussion expressly considers impacts to small entities in the context of its 4(b)(2) analysis.<sup>31</sup> In other words, NOAA expressly considers 4(b)(2) critical habitat exclusions as a regulatory alternative for small entities.

Given that NOAA operates under largely the same statutory conditions as FWS in making critical habitat designations, Advocacy recommends that FWS adopt NOAA's RFA approach in complying with the RFA. Doing so also supports not only the directives listed in the Presidential Memorandum, but also the principles of E.O. 13563 (encouraging consistency in the federal government) and the January 18, 2011 Presidential Memorandum (stressing the importance of considering regulatory impacts to small businesses).<sup>32</sup>

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<sup>29</sup> Presidential Memorandum, *supra* note 2 at 2 (quoting from presidential directives (1), (5), and (6) in the memorandum).

<sup>30</sup> See e.g. Designation of Critical Habitat for the Southern Distinct Population Segment of North American Green Sturgeon, 74 Fed. Reg. 52300, (October 9, 2009) (*Economic Analysis of the Impacts of Designating Critical Habitat for the Threatened Southern Distinct Population Segment of North American Green Sturgeon* at Appendix C).

<sup>31</sup> *Id.* at C-35 ("The extent to which the economic impact to small entities would be reduced depends on how many, and which, units would be excluded... It is estimated that the exclusions as recommended in the ESA 4(b)(2) analysis report will result in reductions in annualized impacts per small entity.").

<sup>32</sup> See EO 13563 *supra* note 3. ("In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote such coordination, simplification, and harmonization."); *Presidential Memorandum for the Heads of Executive Departments and Agencies: Regulatory Flexibility, Small Business, and Job Creation* (January 18, 2011).

**Small Forestry Businesses Are Concerned That FWS Is Not Considering the Economic Impacts of this Critical Habitat Designation**

Advocacy has spoken with small businesses in the forestry industry who are concerned that FWS is not considering the impact this rule will have on the forestry industry. FWS predicts that 16 percent of the expected costs of the critical habitat designation will be incurred by the forestry industry. Small entities in this industry believe that this number has been underestimated. They also expressed concern that FWS has not taken into account the fact that the forestry industry has been hard hit in the past several years leading to many small businesses in this industry closing. Additional costs have a greater impact in an industry that has not yet recovered from the economic downturn.

**Conclusion**

Critical habitat designations have direct effects on small businesses which should be reflected in FWS's regulatory flexibility analyses. Advocacy encourages FWS to review its cost impact estimates and to consider the current state of the forestry industry when determining areas that can be excluded from this critical habitat designation based upon economic impact. Please feel free to contact me or Kia Dennis, Assistant Chief Counsel, at 202-205-6936 if you have any questions.

Sincerely,

/s/

Winslow Sargeant, Ph.D  
Chief Counsel

/s/

Kia Dennis  
Assistant Chief Counsel